Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSEFA FUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR REHEARING

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6 pp

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STATEMENT

This brief is submitted in response to this Court's order of October 2, 1995, inviting the Solicitor General to file a response to the petition for rehearing.

1. Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to distribute heroin, in violation of 21 U.S.C. 846; one count of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); two counts of using firearms during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1), and one count of distributing 25 grams of heroin, in

violation of 21 U.S.C. 841(a)(1). Pet. App. 18A. The court of appeals affirmed. Pet. App. 2a-17a.

2. The petition for a writ of certiorari in this case presented two questions, both of them concerning the validity of petitioner's convictions under 18 U.S.C. 924(c)(1). Both questions concerned whether petitioner could properly be sentenced to consecutive terms of imprisonment on the two Section 924(c) counts. Pet. i. Petitioner argued that, because the predicate offenses were parts of the same underlying crime and based upon proof of the same facts, neither conviction for Section 924(c)(1) constituted a "second or subsequent" conviction, for which a consecutive sentence was required. Pet. i, 5-10.

Petitioner's husband and co-defendant, Rolando Lopez, who was also convicted on two counts under Section 924(c)(1), also filed a petition for certiorari. Like petitioner, Lopez argued that he could not be sentenced to consecutive terms of imprisonment for the two Section 924(c)(1) violations. Lopez's petition, however, also presented the following question:

> Whether the evidence is sufficient to convict petitioner of a second crime of using or carrying a firearm during a drug trafficking crime, where a firearm is found at an unoccupied residence several miles away from where petitioner was arrested for drug trafficking.

94-1432 Pet. i.

3. On April 17, 1995, after the petitions were filed in both cases, this Court granted certiorari in *Bailey* v. *United States*, No. 94-7448, and *Robinson* v. *United States*, No. 94-7492, and consolidated the two cases for briefing and argument. Those cases present the question whether evidence of proximity and accessi-

bility of a firearm to the drugs or the proceeds of drug trafficking is sufficient to permit a jury to infer that a defendant has "use[d] or carrie[d]" the firearm "during and in relation to [a] * * * drug trafficking crime" in violation of 18 U.S.C. 924(c)(1).

4. On April 28, 1995, we filed a brief opposing the petition in petitioner's case. We suggested, however, that the petition in Lopez's case be held pending this Court's decision in *Bailey* and *Robinson*, since in our view the decision in those cases could affect the proper disposition of Lopez's claim that the evidence was insufficient to convict him on one of the Section 924(c)(1) counts. On May 30, 1995, the Court denied the petition for a writ of certiorari in this case. 115 S. Ct. 2246. The Court has taken no action on the petition for a writ of certiorari in Lopez's case.

ARGUMENT

Rule 14.1(a) of the Rules of this Court states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."* As this Court has explained, "[a] litigant seeking review in this Court of a claim properly raised in the lower courts * * * generally possesses the ability to frame the question to be decided in any way he chooses." *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). But the framing of the question "has significant consequences," *ibid.*, because this Court "will entertain issues withheld until merits briefing only in the most exceptional cases." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214, 2219 (1995) (internal quotation marks omitted).

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* The recent amendments to this Court's rules did not alter that portion of Rule 14.1(a).

As petitioner concedes (Pet. for Reh'g 3), the petition in this case did not present any question concerning the sufficiency of the evidence to convict petitioner on either of the Section 924(c)(1) counts. And the questions it did present did not raise issues that could be affected in any way by this Court's disposition of *Bailey* and *Robinson*. Had the petition raised such a question, we would have responded as we did to the petition filed by petitioner's co-defendant. We would have noted that this Court's decision in *Bailey* and *Robinson* could affect the proper disposition of petitioner's conviction on one of the Section 924(c)(1) counts. We would therefore have urged the Court to hold this case pending its decision in *Bailey* and *Robinson* and then to dispose of it accordingly. Since petitioner did not raise any question whose resolution could be affected by *Bailey* and *Robinson*, however, a grant of certiorari would not be warranted in this case regardless of the outcome of those cases. In our view, the Court therefore properly denied the petition.

CONCLUSION

The petition for rehearing should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1995